

Alexian Brothers Medical Center and Arnold Michaels and Joachim Saldanha. Cases 13-CA-29727 and 13-CA-29840

April 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On September 3, 1991, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that "even if the Respondent's asserted [lawful] reasons for [employee Saldanha's poor] evaluation are true," the Respondent coerced and tended to restrain Saldanha from engaging in union activities by leading him to believe the evaluation was based on such activity. The judge rested this finding on Saldanha's credited testimony that his supervisor, Carney, told him that he thought the (poor) evaluation was because of the Union. The judge, however, failed to specify whether Carney's statement constituted an independent violation of Section 8(a)(1) of the Act. We find that the statement constituted such a violation because it might reasonably suggest to Saldanha that he could suffer penalties for union activities. It therefore had the tendency to interfere with, restrain, and coerce Saldanha in the exercise of his Section 7 rights.

2. The judge also found that the Respondent violated Section 8(a)(3) of the Act by, in fact, "withholding a raise" from Saldanha "because of his protected activities, or leading him to believe that such activities were the cause of the raise being withheld." (Emphasis added.)² The Respondent excepts, and contends that

there is no evidence of union animus in the decision to withhold the raise and, therefore, no basis to support an 8(a)(3) violation. For the following reasons, we find merit in the Respondent's exception.

It is well established that, in general, to find an employer's conduct unlawful under Section 8(a)(3) we must find a prohibited motive. If the unlawful motive is not present or cannot be inferred as a matter of law, there is no violation of the Act, even if the employer's conduct is deemed unjustified or unfair.³ The initial burden of proof is on the General Counsel.⁴

The record reveals that when Vice President of Business Development/Facilities Tim Schmitt took over the management of the maintenance and powerhouse employees in August 1989 he expressed concern about improving the quantity and quality of the work. He met with Supervisor Carney sometime in 1989 for the purpose of developing new production standards and evaluation procedures. During that meeting, Carney, in response to Schmitt's request to grade the employees under his supervision, graded Saldanha as one of the two worst employees in the department.

By July 1990, Carney had developed some new standards, and, in August 1990, he prepared an evaluation of Saldanha for the preceding year. In doing so, however, Carney used the old standards, pursuant to which he rated Saldanha as "normally meets expectations," and recommended him for a 4-percent raise. Schmitt reviewed the evaluation and directed Carney to redo it using the new standards. The resulting poor evaluation, in which Saldanha received an unsatisfactory rating and was not recommended for a raise, and the consequent withholding of a wage increase were found by the judge to be in violation of Section 8(a)(3) and (1). The judge found no direct evidence of union animus on the part of the Respondent's higher management but he speculated that, if it existed at all it was with Schmitt. The judge based this inference on the fact that Schmitt directed Carney to redo Saldanha's evaluation. However, Carney credibly testified that Schmitt said nothing about the Union when he directed Carney to redo Saldanha's evaluation, and Schmitt's testimony that he did not know that Saldanha was a union supporter was uncontradicted. In addition, the judge did not discredit Schmitt's and Mike Cole's testimony,⁵ corroborated by Carney, about the reason the Respondent changed its production standards, nor did

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We note that because the judge cast his 8(a)(3) "Conclusions of Law" in the alternative, and because the "leading to believe" finding does not necessarily constitute a finding of unlawful motive in the withholding of the increase, it is arguable that the judge did not even state an adequate ultimate finding on this 8(a)(3) issue. In any event, even assuming that the judge has made an unequivocal appro-

priate finding of unlawful motive, for the reasons explained below, we find that it is not supported by a preponderance of the evidence.

³ See *NLRB v. Brown Food Store*, 380 U.S. 278, 286-287 (1965).

⁴ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

⁵ Cole was a director, apparently above Carney in the supervisory hierarchy, and reported to Schmitt.

he find that the process used by the Respondent to make its changes was discriminatory on its face.

The judge, nevertheless, found that "it stretches the bounds of coincidence that the most visible Union supporter [Saldanha] was chosen to be the first employee reevaluated under the new system." Although Saldanha's being the first employee to be evaluated under the new standards may at first blush offer support for the judge's statement, the timing of Saldanha's evaluation and Carney's redoing it under the new standards has a factual basis that is free of any suggestion of discriminatory intent. Thus, Saldanha was due to be evaluated at that particular time, and according to Schmitt's testimony, Saldanha's evaluation happened to be the first he reviewed. Further, the testimony of both Schmitt and Carney indicates that the former directed the latter to redo the evaluation because Schmitt believed it was inconsistent with Carney's previous low oral rating of Saldanha, and thus could not be justified. In addition, according to Carney, when he told Schmitt that the form under the old standards made it difficult not to rate an employee as other than "normally meets expectations," Schmitt told him to redo the evaluation using the new standards. Schmitt's testimony, although it differs from Carney's in this regard, is not really at odds with Carney's version. Instead, it indicates that Carney was afraid that management would not support a lower rating than what he had given Saldanha, and that when Schmitt reminded Carney that the new system was Schmitt's idea and would be supported Carney said he would change the evaluation. Significantly, their testimony concerning their dealings with each other over Saldanha's evaluation is wholly devoid of mention of the Union. Indeed, although the judge found that Carney told *Saldanha* that he thought the evaluation was because of the Union, the judge also stated, "I do not know what he based this comment on however."

In any event, we find no other evidence that the Respondent harbored any union animus. The judge found that Carney had knowledge of Saldanha's activities, but there is no evidence that he shared that knowledge with anyone. To the contrary, at a supervisory meeting he told higher management officials, in response to an inquiry from one of them, that he did not know which employees were for the Union. We also note that at that meeting the Respondent directed its supervisors not to interfere with its employees' organizing efforts. Thus, except for Carney's unlawful statement, there is no evidence of animus on the part of the Respondent, let alone any other unlawful activity.

Finally, we find that Mary Ann Magnifico's changing of Saldanha's evaluation, after she replaced Schmitt,⁶ was not initiated because of a belief that

union animus had been previously involved. Rather, as the judge acknowledged, she recognized the unfairness in Saldanha's being given an annual evaluation based on standards that had been in existence only 1 month, and which the employees apparently had not previously been told would be applied to them in rating their past performances. We also note that Vice President of Human Resources Johnson agreed with Magnifico that Saldanha should receive the same evaluation as in previous years, while being advised that the new standards would be used in the upcoming year; and this was done.

Unlike the judge, we find that a preponderance of the evidence does not establish that union animus was a motivating factor in the reevaluation of Saldanha's performance and the withholding of his raise. As noted above (fn. 2), even the judge expressed doubts as to the existence of actual union animus through his equivocal phrasing of his Conclusion of Law 3. Thus, we conclude that the General Counsel has not carried his burden of proving by a preponderance of the evidence that Saldanha's reevaluation and denial of a raise was discriminatory within the meaning of the Act. Accordingly, we shall dismiss the 8(a)(3) allegations and revise the Conclusions of Law, Remedy, and Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. By telling an employee, and thus leading him to believe, that his protected activities on behalf of the Union were the cause of his poor evaluation, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act."

AMENDED REMEDY

Substitute the following for the first paragraph of the Remedy.

"Having found that the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, it shall be ordered to cease and desist and to post the appropriate notice."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Alexian Brothers Medical Center, Elk Grove, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Telling employees, and thus leading them to believe, that their protected activities on behalf of the Union were the cause of their poor evaluations."

⁶Schmitt was relieved as manager of the maintenance and powerhouse employees almost immediately after the Saldanha evaluation.

The record does not indicate why this management change was made.

2. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, dissenting in part.

My colleagues have found that Respondent did not act for union reasons when it gave employee Saldanha a negative evaluation and denied him a wage increase. They make this finding despite the fact that the Respondent, through its agent, told Saldanha that the action *was* based on his union activity. Accordingly, I dissent.

As an initial matter, I believe that the General Counsel has established a strong prima facie case that a reason for the denial of the wage increase to Saldanha was the union activity of Saldanha. In this regard, I note that Saldanha was the most visible union adherent in the plant. Further, his union activity was known by the Respondent (at *least* through Carney). Most importantly, Carney, an agent of the Respondent, told Saldanha that the reason for the denial of the wage increase was the union activity of Saldanha. The Respondent committed 8(a)(1) conduct through this statement. In these circumstances, I believe that the General Counsel has established a strong prima facie case.

I do not believe that the Respondent has rebutted this strong prima facie case. In essence, the Respondent argues that Schmitt made the decision and that he had no knowledge of Saldanha's union activities. I do not doubt that Schmitt made the decision. However, I do have grave doubts about his asserted lack of knowledge. That assertion is supported only by Schmitt's self-serving denial. Weighing against this assertion are two well-supported factors: (1) Saldanha's high visibility as a union adherent and (2) the fact that Carney, after talking to Schmitt, said that Schmitt's decision regarding Saldanha was based on Saldanha's union activity.

In addition to the above, I share the judge's skepticism of the Respondent's assertion that Saldanha simply happened to be the first employee subject to a new evaluation system. The skepticism is heightened when one realizes that Saldanha's 1-year evaluation was based on this system even though it had been in existence for only 1 month.

Concededly, the judge did not expressly discredit Schmitt and the Respondent's other witnesses. However, he impliedly did so by basing the violation, in part, on a finding that the Respondent withheld the wage increase because of Saldanha's union activities. In order to clarify this matter, I would remand the case for express credibility resolutions. Thus, unlike my colleagues, I would not dismiss the complaint at this juncture.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

In recognition of these rights, we notify our employees.

WE WILL NOT tell our employees, and thus lead them to believe, that their protected activities on behalf of Local 399, International Union of Operating Engineers, AFL-CIO were the cause of their poor evaluations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ALEXIAN BROTHERS MEDICAL CENTER

Jessica T. Willis, Esq., for the General Counsel.

Mark D. Nelson and Sandra J. Tyra, Esqs., of Chicago, Illinois, for the Respondent

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On September 24, 1990, Arnold Michaels, an individual, filed an unfair labor practice charge against Alexian Brothers Medical Center (Respondent or Alexian Brothers) in Case 13-CA-29727. On November 6, 1990, the Regional Director for Region 13 issued a complaint and notice of hearing alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by discharging Michaels because he engaged in protected concerted activities.

On November 13, 1990, Joachim Saldanha, an individual, filed an unfair labor practice charge against Respondent in Case 13-CA-29840. On December 28, 1990, the Regional Director issued a complaint and notice of hearing alleging that Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to grant a wage increase to Saldanha because he engaged in protected concerted activities.

Respondent filed timely answers to these complaints, admitting certain allegations including the jurisdictional allegations, but denying the commission of an unfair labor practice. On January 4, 1991, an order consolidating cases issued which consolidated Cases 13-CA-29727 and 13-CA-29840. Hearing was held in these matters in Chicago, Illinois, on June 3, 4, and 5, 1991. Briefs were received from the parties on August 9, 1991. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Elk Grove, Illinois, is engaged as a health care institution in the operation of a hospital, providing inpatient and outpatient medical and professional care to the general public. As noted, the Respondent admitted the jurisdictional allegations of the complaint and I find that it is now and has been, at all time material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that International Union of Operating Engineers, Local 399, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint alleges that Respondent, acting through an admitted supervisor, James Carney, threatened employees that they would not receive a wage increase and would lose their jobs because of their union activity. It is further alleged that subsequent to these threats, Respondent withheld a wage increase from Saldanha and discharged Michaels because they engaged in activities on behalf of the Union. Respondent denies both the making of the threats and that the actions taken with respect to Saldanha and Michaels had any relationship to their union activities.

A. *Facts Relating to the Complaint Allegations*

1. Background facts

Respondent operates a full service hospital in Elk Grove, Illinois. As pertinent to this proceeding, it employs a number of maintenance and powerhouse engineers, who are divided into two groups for supervisory purposes. One group which is primarily involved with the powerhouse operations consists of approximately nine employees and is directly supervised by Jim Carney. The other group consists of approximately 20 maintenance engineers and is directly supervised by Facility Manager Bob Plachy.

Although the evidence on this point is not altogether clear, Plachy and Carney at most times relevant to this proceeding, reported to Mike Cole, called a director. Cole reported to Vice President Tim Schmitt. At least with respect to personnel matters, Schmitt answered to Vice President of Human Resources Roger Johnson. Schmitt and Johnson were subordinate to Executive Vice President Lee Domanico. In the fall of 1990, Mary Ann Magnifico evidently was given the responsibilities of both Cole and Schmitt insofar as the

management of the maintenance and powerhouse employees is concerned. Cole left the employ of Respondent in February 1991, in a reorganization of management. Plachy may not have had to deal with either Cole or Schmitt with regard to personnel matters as the evidence shows he went directly to human resources on such matters, dealing there with Personnel Director Dennis Schroedter, who is subordinate to Roger Johnson.

Charging Party Arnold Michaels worked in the group of employees supervised by Bob Plachy. His immediate supervisor was Bob Rogers. Charging Party Joachim Saldanha worked in the powerhouse group of maintenance employees, and was supervised by Jim Carney. In June 1989, primarily because of dissatisfaction with their treatment by Cole, Saldanha and fellow powerhouse employee Steve Sullivan sought out the Union and initiated a campaign to organize all of Respondent's maintenance employees. Saldanha was the primary mover in this effort. He obtained a number of authorization cards and secured the signing of some or all of these by powerhouse employees. He gave a number of cards to Michaels and Michaels' fellow maintenance employee, John Zuffrano, to obtain signatures among their group of maintenance workers. Michaels passed out about seven such cards and returned about three signed cards to Saldanha. The organizing effort was stayed pending resolution of the Board's health care rules by the courts. Then in May 1990, Saldanha again began distributing authorization cards a second time. Several employees, including Saldanha and Sullivan, signed cards during this second circulation. Evidently, Michaels, who testified that he signed a card in 1989, did not sign a second card in 1990.

The extent to which Respondent opposed the campaign is not detailed in the record. However, Respondent's management did hold some employee meetings in 1989, urging employees to come to them with any problems they may have had. Employee Steve Sullivan responded by taking a list of problems to Domanico and was heard. Evidently no changes were promised or occurred as a result of this meeting, which was cordial. Supervisor Carney testified that he attended a meeting with Domanico, Schmitt, and Cole where he was told of the organizing campaign and advised not to interfere with the campaign or harass in any way the employees under his supervision. He was asked who among his employees was supporting the Union, but he did not know. There are no allegations of campaign misconduct on the part of Respondent within this timeframe, though there is some evidence of interrogation by supervisors which will be discussed later. All direct evidence concerning threats, interrogations, or unlawful motivation for action taken by Respondent is directed at the two supervisors, Carney and Plachy. There is no evidence of any unlawful statement or threat being made by anyone in management higher in the chain of command than these two men.

2. Evidence relating to the discharge of Arnold Michaels

Michaels began working for Respondent in August 1979 and continued that employment until his termination on June 18, 1990. He was employed as a maintenance engineer on the second shift, working between the hours of 3 and 11 p.m. As noted above, his immediate supervisor was Bob Rogers, and his manager was Bob Plachy. Michaels testified that Re-

spondent gained knowledge of his union support in 1989, when according to Michaels, Supervisor Bob Plachy observed him giving an authorization card to fellow employee Dale Cavanaugh in the shop. On cross-examination, he was not sure that Plachy saw him give the card to Cavanaugh as his back was to Plachy.¹ Michaels testified that Plachy approached the two employees almost immediately after he had given Cavanaugh a card. Cavanaugh kiddingly asked Plachy to witness his signing of the card, to which Plachy replied, "Oh, you are going Union." A day or two later, Plachy called Michaels into his office and asked him what was going on with the Union. Michaels told him that because the administration failed to hear the employees' pleas for better conditions in the shop, including stopping favoritism, the employees felt they needed representation. Plachy replied that he had no trouble with the Union as he had been a union steward in his employment with another company.² Michaels then said that he did not think that the administration would appreciate the employees seeking representation. In June 1989, Michaels was given a "final" warning about excessive absenteeism with discharge threatened for future absenteeism. He also received a 1-day suspension at this time. No one contends that this warning and suspension was motivated by Michaels' union activity.

Employee John Zuffrano testified that in 1989, Plachy asked him if he were the instigator of the union organizing campaign. Zuffrano replied that he was not the instigator, that he had just been asked to help out and was doing nothing more. Zuffrano is a longtime member of the Union, a fact that was known by Plachy. Though Plachy evidently suspected Zuffrano of union support and may have suspected that Michaels was a union supporter, nothing adverse or unusual happened to either employee until June 1990. Plachy testified that he was aware of the 1989 union campaign and was aware that employees John Zuffrano, Dominic Exconi, and Steve Sullivan were union supporters. He testified that he never heard of Michaels supporting the Union.

In April 1990, Michaels had another conversation with Plachy in Plachy's office about Michaels' belief that Respondent was showing favoritism toward a coemployee. Michaels had heard that fellow employee Bill Brandt had been forced to work on a weekend to cover for another employee who was taking off. Brandt had been denied overtime for this work and was required to take a day off instead. Michaels questioned Plachy about this situation, noting that another employee got overtime for apparent make-work. Though Plachy brushed the question off at the time, he later called Michaels into his office where he explained that the employee drawing overtime was learning to operate a special machine and because of budget outlays, the time spent was charged to another account, snow removal. Michaels said that this did not seem fair. Plachy suggested that Michaels should become a union steward, and Michaels replied that if the Union came in, he might be steward.³

¹ Employee Steve Sullivan testified that he observed this incident and that Supervisor Plachy did not see Michaels give Cavanaugh the card.

² Plachy had been a steward for the UAW in his employment with International Harvester Company. He admitted that he told more than one employee he had no problems with unions.

³ Plachy recalled this conversation and his description of it was that it was not confrontational and his remark to Michaels was

Shortly after this meeting, Michaels asked Plachy for the employees' overtime cards, intending to take them to Respondent's executive vice president Domanico. Plachy declined to give him the cards, telling him more or less that he would not give Michaels fuel to light a fire under him. I cannot find in the record that Plachy addressed this alleged conversation and will credit Michaels testimony that it occurred. However, I do not find that it supports Michaels' assertion that his union activities were behind his discharge. If Plachy's motives with respect to his treatment of Michaels were anything less than legitimate, I believe their roots are found not in Michaels' nominal union activity, but in the following testimony given by Michaels himself. Michaels testified that "Plachy has—would have like to have seen me gone from the day that he started—in several instances, he treated me differently than he treated other people. I had offered to make up time when I had to take time off and he refused that. He would allow other people to make up days they had taken off. Plachy on more than one occasion accused me of being after his job."

The next noted encounter between Michaels and Supervisor Plachy was at a regular employee meeting held in mid-May 1990, and attended by all maintenance and powerhouse employees and several management representatives including Supervisor Plachy, Executive Vice President Domanico, and Human Resources Vice President Roger Johnson. At this meeting Michaels brought up the fact that a relatively new man had been allowed to attend an industry show in Chicago and was paid for attending. The senior men, including Michaels, were told if they arrived late for their shift because of attending the show, they would have their pay docked. Management, through Mike Cole, responded that the employee allowed to attend the show had been sent there to look at a particular machine and determine if he could operate it. Michaels did not accept that explanation as the Respondent had purchased such a machine a year earlier.

Michaels then brought up the fact that outside contractors had keys to areas that employees did not, that material was disappearing from these areas and that the employees were being blamed, but not the contractors. Plachy replied that Michaels was trying to get a key to his office and that he was always looking for a change. Michaels then said that if the Union were in, the employees would be able to have those changes. According to Michaels, Plachy gave an angry response which Michaels cannot remember.

Powerhouse employee Steve Sullivan attended this meeting and remembered Michaels complaining about the matter of attendance at the industry show. According to Sullivan, management was paying no attention to Michaels. Towards the end of the meeting, Michaels said to just wait until the Union gets here and things will be fair then. There was no response from management according to Sullivan. John Zuffrano recalled Michaels saying that when the Union gets here, things are going to change around here. He could not remember any other details of the meeting, but noted that Michaels and Plachy had had a number of arguments over the years.

Michaels' problems that formed the basis for his discharge began in the first part of June 1990. Michaels was scheduled

meant as a compliment. I credit his explanation as Plachy was never shown to harbor any union animus.

to work June 3–7, and did work on June 3. Michaels did not report to work on June 4 because he had car trouble. On this date, the Respondent's dispatcher had called him to see if he could come in early as the hospital was overloaded with work. He told the dispatcher that it was likely he would not make it to work because of problems with his car. According to Michaels, the dispatcher said she would report the situation to Bob Rogers, Michaels' immediate supervisor. Plachy testified that the dispatcher reported Michaels' response to him that day. As Michaels not only did not report to work early on June 4, but also did not report for his scheduled shift, Respondent contends that he violated its call-in requirement.

According to Michaels, the call-in procedure for his department required an employee to call in 1 hour before his shift if he knew he was not coming in. This is apparently correct. Plachy testified that unscheduled absenteeism could result in having to replace the absent scheduled employee with another employee paid overtime or double time. Absenteeism also presented a problem if the absent employee's skill was needed and was not possessed by another employee. The call-in procedure allowed management time to fill in for the absent employee if necessary. Employees are supposed to call their immediate supervisor, or in their absence another supervisor. Michaels had been specifically instructed to call either Supervisor Rogers or Manager Plachy. However, for his own reasons, he apparently never called either of these two or any other supervisor on those occasions when he called in to report he was going to be absent. He chose instead to call the hospital's dispatcher, whom he asked to relay his message to his supervisors. This breach of procedure was overlooked when Michaels was absent for 3 days in early May 1990, but was part of the basis for his termination for his absences in June 1990.

On the next day, June 5, Michaels did not report to work because he received a threatening phone call related to his son, who evidently has a serious problem with physically violent gangs in the Chicago area. In response, Michaels called the police who suggested that he leave his home. When Michaels declined to do so, the police volunteered to step up patrols near his home, but could not afford to station personnel at his home. Fearing for the safety of his wife and home, Michaels decided to stay home. He testified that on June 5, he called the Respondent's dispatcher and told her what had occurred. He also told her he would probably be taking off a couple of days to protect his wife and property. The dispatcher said she would relay this information to Supervisor Rogers. Michaels was called by Rogers that day, and Michaels testified that he gave him the same information he had given the dispatcher. Michaels also told him he should not tell Plachy because he would probably be happy to hear that someone wanted to injure Michaels. Rogers told Michaels to be careful and that he would be talking to him again. According to Michaels, he was not told that he could not take the time off.

Plachy was unaware that Michaels had called the dispatcher on June 5. As Michaels did not report to work for his shift, Plachy asked Rogers to call and find out when Michaels was coming back to work. After some failed attempts to reach Michaels, Rogers did contact him and reported back to Plachy that Michaels was difficult to understand and had mumbled something about a problem at home, and would be

in the next day. Plachy then called Personnel Director Dennis Schroedter, advised him of the situation, and asked him how to proceed. Schroedter told him to continue to try reaching Michaels and find out when he was returning to work.⁴

Michaels did not go to work on June 6, and he did not call in. Rogers called him and asked if he was coming in and Michaels replied that nothing had changed and that he would not be coming in. When Michaels did not report for work or call in, Plachy instructed Rogers to call him, for, among other things, the combination of the lock on Michaels' locker. Respondent planned to do some work on the lockers that day. Rogers called Michaels and reported to Plachy that he was difficult to understand, could not remember the combination, and said to cut the lock off.⁵

Michaels did not go to work on Thursday, June 7, and did not call in because he was sleeping during the day because of his activity in protecting his home at night. At about 7:30 p.m., about 4-1/2 hours after the scheduled start of his shift, he called the hospital and asked to speak with Head Housekeeping Supervisor Wilson David. He spoke instead with Kathy Muncie, a leadperson in housekeeping, who was filling in for David. He explained his situation to her and told her that he expected to be in on Sunday, his next scheduled day of work. She said she would report this to Supervisor Rogers. There was no explanation why Rogers was not called directly by Michaels. On this date, Plachy tried to reach Michaels on several occasions, but was unsuccessful. Michaels testified that he cut off the ringer on his telephone so he could sleep.

On June 8, Plachy tried to reach Michaels again, though it was Michaels' normal day off. He wanted to tell him not to report on his next scheduled work day, Sunday, June 10, because he had covered Michaels' shift with another employee. Plachy spoke again with Schroedter on this date and was advised to try to call Michaels, and if he was unsuccessful, to notify him in writing not to report on Sunday. Therefore, Plachy sent Michaels a letter by courier.

On June 8, Michaels observed someone putting something in his mailbox, but did not attempt to see what it was as he believed it might be a letter bomb. On Saturday, June 9, he decided to open his mailbox with a broom and discovered a letter from Plachy, which advised that Plachy had been unable to reach him on June 7 and 8 and that he had been taken off the Sunday schedule. He was also advised to contact Rogers before returning to work.

On Sunday morning, Michaels called Rogers to advise he would not be coming in pursuant to Plachy's instructions.

Plachy testified that on Monday, June 11, he received a phone call from Michaels who asked, "Am I in deep trouble?" Plachy replied that he probably was, but he should come in and talk about it.⁶ Michaels reported to the hospital

⁴Michaels had been given a warning about excessive absenteeism and failure to follow the call-in policy by Schroedter in June 1989. At that time, it was stressed that Michaels call his supervisor if he was not going to be able to make his shift. Michaels had been given similar warnings in 1985, 1986, 1987, and 1988.

⁵Michaels testified that during this timeframe, he was getting very little sleep because of worrying about the threat of harm to him and thus was very tired when he spoke with Rogers.

⁶Zuffrano testified that Michaels had discussed his June 1989 warning with him and had mentioned that he would be discharged if he was absent again.

and was taken by Plachy to see Dennis Schroedter. According to Michaels, Schroedter asked Plachy if he knew why Michaels had been off work and Plachy said he did not. Plachy also said that Michaels had been off a total of 13 days (apparently unscheduled days) during the last year. Schroedter asked Michaels why he had been off and Michaels began explaining the situation. According to Michaels, Schroedter became aggressive and began interrogating him. Responding to Schroedter's manner, Michaels told him that if he wanted to suspend him, he could suspend him; however, if he wanted to terminate him, he would have a fight on his hands. Schroedter asked if Michaels had contacted Supervisor Rogers while he was absent and Michaels replied that he had not, testifying that he did not want to get Rogers in trouble with Plachy. He thought that Rogers had taken him at his word when he had asked that Plachy not be told of this problem.

According to Michaels, Schroedter threw Michaels' personnel file on the desk and asked if he planned to fight with a file like that. Michaels accused Plachy of creating the file and Schroedter told him to go home, that he would check out his story and would contact him later. Michaels expected he would be suspended.

With respect to this meeting, Plachy testified that Schroedter asked Michaels why he had not called in to report he would not be at work? According to Plachy, Michaels responded with an apology, saying, "I knew better, I should have but I didn't. Next time I will know. If I have to, I will make arrangements with my brother-in-law or somebody to drive me to work." Michaels also explained the circumstances of his absence, but Schroedter was most concerned with his failure to call in.

Schroedter testified that he asked Michaels why he had been absent and whether or not he had made contact with the supervisory personnel in his department. Michaels told Schroedter about his car problem and the gang problem. With respect to calling in, he said that he did not contact Plachy because he did not believe Plachy would be sympathetic to his problem. Schroedter asked why he didn't call some other management person. Michaels replied, "Well, maybe I should have." Michaels also indicated that he could have gotten to work on the first day of his absence by using his wife's car or getting a fellow worker to take him.

Schroedter said Michaels admitted that he had been excessively absent, saying, "Yes, I understand that I have a bad work record. Not performance-wise, but attendance-wise." Schroedter testified that he was frustrated because he had had previous conversations with Michaels on the same subject and had stressed on those occasions the seriousness of his absenteeism, that he should be regular in attendance and should call his supervisors in a timely manner if he was going to be unavoidably absent.

The next day, worrying about not telling management that he had in fact talked to Supervisor Rogers about his absence, Michaels went to see Roger Johnson, head of human resources. He informed Johnson of the true facts and Johnson asked that Schroedter be similarly informed. Michaels also had a conversation with Plachy who did not know what was happening with respect to possible discipline.

A day or two after his meeting with Michaels, Schroedter had a conversation with Roger Johnson. Schroedter recommended that Michaels be terminated because he did not

believe that there was any way to change his behavior with respect to attendance or calling his supervisors.⁷

Johnson testified that Michaels was discharged for excessive absenteeism. After having been informed of the problem by Schroedter, he advised Schroedter to check the facts. Later, he had a meeting with Schroedter and Plachy. Schroedter did not believe that there were acceptable reasons for Michaels not notifying the department on a timely basis, that Michaels had alternate means of getting to work, and that he had been warned about the same problem in the past. Schroedter recommended discharge as did Plachy.

Johnson testified that the hospital considers excessive absenteeism to include patterns of absences, reasons for absences, timely notification of absences, documentation of absences, and prior work record. There is no specific discipline for a given number of absences. Human resources regularly becomes involved in disciplinary matters and about 90 percent of all disciplinary actions are reviewed by Johnson. All issues of discharge are reviewed by him.

After Michaels was discharged, he pursued an internal grievance over the matter. Human resources assigned a very qualified and competent employee to aid him.⁸ The two prepared a comprehensive written grievance touching on all matters regarding the incident for which Michaels was terminated. The preparation of this document required several days, several interviews, and a number of corrections. At no time in this process did Michaels raise the possibility that union activity may be a cause for his termination. During the process, Michaels admitted that his absenteeism was excessive.

The grievance was presented to a panel of composed of management and nonmanagement employees and Michaels was given the opportunity to present the written grievance and explain his case. At the end of his presentation, he mentioned for the first time that his union activity might be behind his termination. The panel voted to uphold the discharge.

3. Evidence relating to the threat to discharge and the wage increase withheld from Joachim Saldanha

Saldanha has been employed by Respondent as a stationary engineer in the powerhouse employee group for about 12 years. His immediate supervisor is Jim Carney. In August 1989, he had a conversation about the Union with Carney, telling him about his union activity and that the employees wanted better representation. Carney said, off the record, "okay, but I do not want them to know I talked to you."⁹

⁷In this regard it should be noted that Respondent has an employee assistance program that helps employees with a variety of problems. Michaels had been referred to this program in the past because of his absenteeism, but chose not to participate.

⁸Johnson testified that he assigned someone other than Schroedter to aid in the grievance because Schroedter had already made up his mind. Michaels thought enough of the efforts made in his behalf by the man assigned to help him that he sent a thank-you note.

⁹Carney admitted that he was aware that Saldanha was a union supporter in the summer of 1989; however, he denied ever having a conversation with Saldanha about the Union. It was pointed out that Saldanha received a 4-percent raise as a result of his August 1989 evaluation even though he was a known union supporter. I found Saldanha to be a credible witness, though somewhat uncertain

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Employees at Respondent's facility are evaluated on an annual basis at their hiring anniversary date. Saldanha received his last evaluation in September 1990, and it was given by Carney. According to Saldanha, when Carney gave him this evaluation, he said he did not agree with it, but that it was handed to him by Tim Schmitt and he had been required to change an earlier evaluation he had prepared. Saldanha had seen the earlier evaluation which had recommended that he get a 4-percent raise. The later evaluation recommended no increase. Saldanha objected to the evaluation as false and wrong and threatened to go to the NLRB about it. According to Saldanha, Carney said that he did not blame him and told him he thought it was because of the Union. Carney admits having this conversation with Saldanha, but denies he mentioned anything about the Union or that Saldanha said he was going to the NLRB. It is difficult to determine the truth in this situation. Both Saldanha and Carney appeared credible. Saldanha undoubtedly believes his union activities are at least in part behind the poor evaluation and testified that he obtained this belief in the instant conversation with Carney. Yet Saldanha was told at this time by Carney that he was going to recommend that he be reevaluated in a couple of months and did not file his charge until November, when the reevaluation was not forthcoming. Therefore, to me, the timing of the conversation seems wrong. Though I cannot be sure, I will credit Saldanha's version of this conversation at least to the extent that Carney is alleged to have said that he thought that the evaluation was because of the Union. I do not know what he based this comment on however. As will be detailed below, Respondent contends that Saldanha's low evaluation was the honest result of evaluating him under a new process that affected all powerhouse employees. Whether Carney considered the entire new evaluation process to be in response to the union campaign or whether he felt Saldanha was a target of Schmitt cannot be determined. I do not believe Carney's thought that the union campaign played a part in the evaluation accurately reflected the truth however, based on subsequent events.

With respect to the evaluation process, Carney testified that sometime in 1989,¹⁰ Tim Schmitt held a meeting with him about employees' performance levels and told him to come up with a new way to evaluate his employees, one which could gauge the amount of work the engineers were producing. In the course of this conversation, Schmitt asked him to grade his employees, with the best receiving a grade of 100. Carney said if his best engineer was 100, his worst was about 25, mentioning Steve Sullivan and Joe Saldanha as the worst.

By July 25, 1990, Carney had prepared some new standards for evaluation which called for some new assignments for the employees. He presented it to the employees under

about the sequence of events. I will credit his testimony in this regard. However, I am not sure what to make of it. Carney had been instructed not to interfere in the campaign or harass employees, so perhaps he did not want to be accused by his superiors of engaging in conversations about the Union with employees in possible violation of the Act. Perhaps he was referring to other employees hearing of the conversation. The "them" referred to could be either management or employees.

¹⁰Tim Schmitt took over the management of the maintenance and powerhouse employees in August 1989.

his supervision shortly thereafter. No one commented when the assignments were announced. It is not clear whether the employees were told that these assignments would have an immediate bearing on their evaluations.

In August 1990, Carney prepared Saldanha's yearly evaluation, filling out the evaluation form as he had in the past, finding that Saldanha "normally meets expectations" and recommending a 4-percent wage increase. He took the evaluation to Mike Cole, who gave it to Tim Schmitt. Schmitt called Carney in and told him that the evaluation was incorrect, because if he evaluated an engineer at 25 percent of the performance of his best engineer, how could he say that employee "normally meets expectations." Carney replied that the way the form was set up, it was difficult not to find that an employee "normally meets expectations."

Schmitt told Carney to redo the evaluation using the new standards he had just finished. He did so, got Cole's approval of the evaluation, and presented it to Saldanha. Saldanha was unhappy as the evaluation called for a zero wage increase. He convinced Carney that he was trying harder, so Carney sent a memo to Cole seeking to have Saldanha reevaluated in another few months. Carney reevaluated Saldanha 2 months later and found that he "normally meets expectations" and recommended a wage increase of 3 percent.

Saldanha has always received raises in the past and there appeared to be no valid reason for the drastic change in the 1990 evaluation as he had not been warned about poor performance nor had he been disciplined. Saldanha testified that in September he was approached by Mary Ann Magnifico,¹¹ who told him that Steve Sullivan had complained to her about his evaluation and she had learned about Saldanha's situation during the course of Sullivan's complaint. She told him she was going to look into the matter. Saldanha told her it was too late because he had just visited the Labor Board.¹² Magnifico replied that she was going to see that he was treated fairly and if he had any complaints to come to her. He said that he was going to think about his evaluation and that he might withdraw his charge. Magnifico said that she could not tell him whether or not to withdraw it, but that she was going to treat him fairly. As a result of Magnifico's efforts Saldanha got his 4-percent increase and attempted to withdraw his charge. The Region refused to accept the withdrawal.

Tim Schmitt testified that in March 1990, he had a meeting with Cole and Carney to discuss increasing performance levels. According to Schmitt, at this meeting Carney, on a scale of 100, placed the performance of Steve Sullivan at about 20 percent and that of Saldanha at about 25 to 30 percent. Schmitt indicated this was not an acceptable level of performance and made suggestions as to increasing them. He discussed how to define the job roles and to identify criteria that could be used to measure performance. He asked Carney to use his suggestions to develop criteria for evaluating the performance of his employees.

¹¹Magnifico had just replaced Schmitt insofar as management of the involved employees is concerned. I found Magnifico to be completely in command of the facts and as credible a witness as I have ever heard. Her entire testimony is credited and to the extent that any other testimony varies from it, her testimony is credited.

¹²Saldanha filed his charge in November, thus he is wrong about these events occurring in September.

Carney completed most of his assigned task. In the summer of 1990 Schmitt began reviewing evaluations and the first he saw was Saldanha's. Schmitt was surprised and concerned because the evaluation was much higher than an employee rated at 25 to 30 percent should be rated. He considered the level of evaluation to reflect performance in the higher range of expectations. Schmitt called Mike Cole and indicated he was upset with the evaluation, asking to speak with Cole and Carney.

At this meeting, Carney explained the evaluation by saying that he did not feel as though he would have management support if the review was written with a lower performance rating. Schmitt pointed out that the new evaluation system was his idea and support would be given. Carney said that he had not been sure, but that he would change the evaluation.

As noted earlier, at about this same time, management of the facilities group of employees was taken from Schmitt and given to Mary Ann Magnifico. Schmitt never again saw the evaluation. Schmitt testified that he did not know that Saldanha was a union supporter.

Magnifico was made assistant vice president of facilities and engineering in August 1990. Shortly after taking over these duties, she had a conversation with Sullivan wherein Sullivan expressed concern about his evaluation because it was not as good as his last one. Magnifico asked whether he had been written up, disciplined, or received any comments about his performance in the past year. Sullivan said he had not. She reviewed the evaluation and found it unusual in that there were no comments to support the various grades assigned Sullivan in the evaluation form. She then asked Sullivan why he thought his evaluation was lower than the previous one. He blamed it on Mike Cole, who he said was out to get the guys, and also mentioned his union support.

Magnifico did not believe this to be the case and decided to review Sullivan's record and speak with Jim Carney. Sullivan also mentioned Saldanha's evaluation being lower than expected and the fact that Saldanha blamed it on a belief that Cole was prejudiced against him because of his Indian origins and his union activity. Cole had evidently made some derogatory comments about Saldanha regarding his heritage. Magnifico determined to look into this matter.

She then got the two employees' personnel files and verified that neither had been written up during the last year. She then called Roger Johnson and explained what she had learned about the evaluations. Johnson said that she had the authority to reopen the evaluations and she indicated that she was going to speak with Carney and Schmitt about the matter. First, however, she went to see Saldanha and he confirmed that he was upset by his evaluation and said that he believed Cole was out to get him because he was Indian. He also said that Carney had told him that Schmitt had made him change his earlier satisfactory evaluation. Saldanha offered, "Tim doesn't like me. They are trying to get us all in here." He believed that part of it was because of the union activity and said that he had told Carney that he was going to talk to someone about it.

Magnifico said she would look into the situation and straighten it out. Saldanha said that he was going to talk to someone about the situation the next day as he had warned Carney.

Magnifico met with Carney and he said he was told by Tim Schmitt to change the evaluations, relating the story about the ranking of employees and the efforts to raise performance levels, indicating that the evaluation was Schmitt's idea, not his. He said the last evaluation was made based upon the new performance standards that had been in effect for about 4 weeks.

Magnifico directed Carney to redo the evaluation to reflect exactly what his expectations were from the employee and to explain to the employee what the job standards and expectations would be for the next year. She asked that this be done immediately. She next called Roger Johnson, telling him what she had discovered. Johnson agreed with her belief that the employees should not be given an annual evaluation based on standards in effect for only a month. He also agreed with her suggestion to give Sullivan and Saldanha evaluations that were the same as the previous year's evaluations and advise them that new standards were being used for the upcoming year.

Carney failed to deliver the redone evaluation on Saldanha as requested, so after checking with Johnson, Magnifico took upon herself to complete the paperwork to give the two employees the same raises they had received the previous year, making the raises retroactive to the evaluation dates. She then informed Sullivan and Saldanha that this had been done. Saldanha expressed some concern to her because he had already filed charges with the Labor Board and did not know whether he wanted to go forward with his complaint. She responded that she could not tell him what to do and for him to do what he thought best for him.

Sullivan offered testimony relating to his evaluation as well as some other conversations he had with Carney wherein he alleged Carney advised him of his precarious position because of union activity. When Sullivan learned that Saldanha was not getting a recommended raise in his 1990 evaluation, he became concerned as he was due to receive an evaluation also.¹³ Therefore, he went to Carney and asked about Saldanha's evaluation. Carney told him that he had recommended a 4-percent raise for Saldanha, but that his boss, Mike Cole disapproved and told him to bring the evaluation to the administration for approval. According to Sullivan, Carney said he met with Tim Schmitt and Lee Domanico, who chastised him for giving Saldanha a raise and was told to eliminate it. Carney said that the hospital had spent \$80,000 fighting the Union and it was not going to pay any more money to the employees than they were then paying, adding that the administration had told him to write "us" up for any little thing he can to get rid of us.¹⁴

¹³ Sullivan testified that Saldanha was expecting a 6-percent raise because the other powerhouse employees had received this level of raise. This is curious because Saldanha was the first powerhouse employee to be evaluated for potential raises for the year. Saldanha himself did not testify about expecting or wanting this level of raise.

¹⁴ Schmitt and Carney testified about the meeting in which Schmitt told Carney to redo the evaluation. No one mentioned Domanico's presence. Carney denied saying anything about the Union and what the Respondent had spent fighting the Union. He denied having any knowledge about what the hospital had spent. I credit his denials. I did not find Sullivan to be a credible witness. He appeared to embellish his testimony with whatever he thought might be harmful to management. Unlike Saldanha, Sullivan was getting a raise in his initial evaluation, the same increase he had gotten the previous year.

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In October 1990, Sullivan received his evaluation, which called for a 3-percent raise. Carney did not comment about the evaluation. This evaluation was the same or similar to evaluations Sullivan had received in prior years, including the amount of the recommended raise.

Also in October, Sullivan became upset about the actions of a fellow employee and complained to Carney. According to Sullivan, Carney told him that he shouldn't do anything because he "was in enough trouble with this union, and would probably be fired by Christmas." Carney added that Saldanha would probably be fired also because of the Union.

With respect to this threat, Carney testified at the end of November or the first of December, Sullivan called him at 10:30 p.m., complaining about another employee coming in and harassing him. He responded that Sullivan shouldn't worry about anybody else's job, but to worry about his own. If Sullivan's job performance didn't improve that he wouldn't be around for Christmas. Carney then hung up. He denied relating anything about the Union to Sullivan. I credit Carney's version of this conversation. Not only did he appear more credible than Sullivan, but other factors support his testimony. Carney did not appear to like Sullivan a great deal. It would not seem likely that he would go out of his way to warn Sullivan that management was out to get him. Saldanha did not testify that he was similarly warned by Carney, though Sullivan alleged that Carney threw his name in whenever these warnings were made. Sullivan and Saldanha were still employed by Respondent at the date of the hearing, some 6 months after Christmas 1990. As noted above, neither had received any discipline since the start of the union campaign in June 1989.

Sullivan also testified that at some point before August 1990, as Carney was leaving on vacation, he called Sullivan from the airport to warn him that the administration may be after Sullivan while Carney was gone. He said that they had been pulling his timesheets as well as those of Saldanha, adding that "they are looking to get you and to watch out." Timesheets are kept on a daily basis and reflect what the employee did on an hourly basis. Sullivan assumed that this action was being taken because of his union activity though Carney did not mention anything about the Union.

Carney denied calling Sullivan from the airport and telling him that the administration was out to get him. He denied telling Steve Sullivan that he was instructed to pull his time sheets. For the reasons set forth above dealing with my findings on the credibility of Sullivan vis a vis Carney, I credit the denial of Carney.

B. Was Arnold Michael Discharged Because He Engaged in Protected Concerted Activities?

Counsel for General Counsel asserts that Michael was discharged by Respondent because he engaged in protected union activities rather than the reason asserted by Respondent, excessive absenteeism, thereby violating Section 8(a)(3) and (1) of the Act. To establish a violation of Section 8(a)(3)

Therefore it makes no sense for Carney to say to him that the hospital was not going to pay any more money to employees. Neither Saldanha nor Sullivan were written up for anything from the start of the union organizing campaign to the date of hearing. At the time of the this alleged statement, the union campaign was over a year old.

and (1) of the Act, General Counsel has the burden of proving that the discharge was illegally motivated, *Superior Coal Co.*, 295 NLRB 439 (1989).

The Board set forth the analysis to be used in determining Respondent's motive in *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line*, the Board first requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even absent the protected conduct. Within the framework of this analysis, if the reasons for the discipline advanced by the employer are deemed to be pretextual, the employer's defense of justification is deemed "wholly without merit." *Wright Line*, supra at fn. 5; *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Furthermore, a finding that the employer's justification was pretextual can augment General Counsel's prima facie case that protected activity was a "motivating factor" in the decision to discipline:

It is the General Counsel's burden to establish a particular motivation on the part of any employer—a discriminatory motivation—in order to prove the instant allegations. Support for a finding of unlawful motivation "is augmented [when] the explanation of the [employer's conduct] offered by the Respondent [does] not stand up under scrutiny."

C-F Air Freight, 247 NLRB 403, 409 (1980) citing *NLRB v. Bird Machine Co.*, 161 F.2d 589, 592 (1st Cir. 1947). However, if the reasons advanced by the employer for the discipline at least have some merit, a "dual motive" for the discipline may exist, and at that point the issue becomes whether the reasons and evidence in support of the reasons advanced by the employer are sufficient to sustain its burden of proof that the employee would have been disciplined regardless of the protected activity. *Wright Line*, supra at fn. 5.

With regard to the necessity of establishing Respondent's knowledge of Michaels' protected activity, General Counsel urges that Michaels' union support was well known. I disagree. He testified that he signed an authorization card in 199, though no such card was shown to exist. He testified that Plachy saw him give a card to coemployee Dale Cavanaugh, but the best evidence suggests that Cavanaugh already had the card when Plachy approached.¹⁵ Michaels did nothing else that would tie him to the Union. Indeed, Plachy testified that he knew John Zuffrano, Dominic Exconi, and Steve Sullivan supported the Union, but never heard of Michaels doing so. The fact that Plachy asked Mi-

¹⁵ General Counsel relies to a great extent on the testimony of Sullivan to show that Plachy saw Michaels hand the card to Cavanaugh. Sullivan testified: "I was coming through the maintenance shop and he was having—Dale Cavanaugh had a card in his hand and they were talking. I started heading over towards him and then Bob Plachy walked out of the office. So I stopped." In response to the question, "Did you actually see Plachy viewing Michaels as he handed a card to Dale Cavanaugh?" "No. Dale Cavanaugh already had the card in his hand when Bob Plachy came walking out the office. He was signing it and turned to Bob Plachy and said, 'Would you like to witness this?' I saw Mike hand him the card. I don't think Bob Plachy did. He was not in his office at the time."

chaels what was going on with the Union could support either the inference that Plachy believed Michaels was for, or against, the Union. Certainly there is no showing that the person who made the decision to discharge, Schroedter or the person who approved that decision, Johnson, had any knowledge of union activity on the part of Michaels.

Moreover, Plachy was not shown to harbor any union animus. He took no action against Zuffrano though he knew him to be a union supporter and a member of the Union. All of the statements attributed to Plachy wherein the Union is mentioned would indicate that Plachy was neutral on the subject. There is no evidence that Schroedter or Johnson harbored union animus. There is no evidence that Domanico harbored union animus. Indeed, Domanico advised Carney not to interfere with the union campaign or harass employees. Even Sullivan indicated he got no hint of any animosity when he responded to Domanico's request that employees bring their problems to him at the outset of the union campaign. The only evidence of management animosity comes from statements attributed to Carney, a matter addressed in the next section of this decision.

If Plachy were aware of Michaels' union support and was determined to get rid of him because of that support, he had the opportunity to do so in early May 1990. As noted by General Counsel on brief, in an April meeting with Plachy, Michaels complained about overtime being denied to a fellow employee. His efforts in this regard prompted Plachy to comment that he would make a good union steward, and Michaels replied that if the Union got in, he may be a steward. Shortly thereafter, Michaels requested that he be given the employees' overtime cards so that he could discuss the situation with Domanico. Plachy angrily refused, saying that he wasn't giving Michaels the fuel to light a fire under him. At about this same time, Michaels was absent from work for 3 days, resulting from an injury arising from his job. He called in to the dispatcher on this occasion, not his supervisor. Yet, Plachy did not seize on this opportunity to discipline Michaels.

The next act which General Counsel contends motivated his discharge occurred in mid-May, when Michaels engaged in an argument with Plachy on the matter of overtime and finished it by saying that things would change or be fairer when the Union came in. I agree with General Counsel that Michaels' activity both at this meeting as well as at the earlier meetings with Plachy was protected. He was acting on behalf of himself and his fellow employees to redress what he believed to be an unfair overtime policy. Nothing he did or said in these meetings would strip him of the protection of the Act. However, did this protected activity contribute to or motivate his discharge? No one who testified about this meeting indicated that the management officials present seemed upset or taken aback by Michaels' statement. Zuffrano testified that Michaels and Plachy had had heated exchanges before. As noted immediately above, Plachy had just about the same type confrontation with Michaels a few weeks before and did not take advantage of Michaels' May absence to discipline him.

General Counsel points to the fact that Michaels was not disciplined for the May absences to support the theory that there was no legitimate reason for discharging Michaels a month later for four more absences. It appears to me that the fact that he was disciplined in May undercuts the notion that

Plachy was out to get Michaels for his protected activity more than it supports the theory that management's reaction to the second set of absences establishes unlawful motivation. First the mid-May meeting was only a few days after Michaels' May absences. Respondent could have reviewed these absences and taken disciplinary action based on them, without waiting for its next opportunity. The next opportunity may never have come. Second, the circumstances of the two sets of absences is also different. In the first, Michaels was absent due to a physical injury that arose out of his job, and he called in to someone every day. In the June incident, Michaels did not call in every day and Plachy was not made aware of the cause of the absence until he took Michaels to Schroedter's office for an interview. Moreover, all he did hear about calls made to Michaels at this time was that he was difficult to understand. I do not believe that it is difficult to understand why a supervisor would become concerned in these circumstances when he did not when an employee was out with a known injury.

Although General Counsel can make some case for the matter that calling in to the dispatcher was not unusual for Michaels, it was not shown that Schroedter ever knew that Michaels was not following his specific instructions to call his supervisor until the June incident. Moreover, the circumstances of the June incident were unusual. Once management began calling him about his absence, I do not find it illogical for them to expect Michaels to call in to them instead of a dispatcher or a leadperson in another department.

According to Plachy's credible testimony, all he heard regarding the reason for Michaels' absence was that Michaels was difficult to understand over the phone and mumbled something about a problem at home. His own efforts to reach Michaels were unsuccessful, thus logically causing him to view this absence with more concern. Michaels himself knew that he was in trouble when he returned to the facility after his absence, and apparently fully expected to be suspended. It was the level of discipline, discharge, that caused him to fight for his cause. Yet, Michaels did not mention that his union activity may have played a part in his discharge until the end of his grievance meeting. Although he testified that he was fearful of raising the matter with Schroedter, Johnson, or the person who aided him in preparing his grievance, I do not believe him. He was not the least bit fearful of accusing his supervisor, Plachy, of being out to get him and causing him to have a bad attendance record. He did this in his meeting with Schroedter and again in his written grievance. He obviously believes this as he testified that Plachy has been trying to get rid of him for years because of Plachy's fear that Michaels is after his job.

Finally, from a credibility standpoint, having carefully listened to their testimony, I do not believe that Johnson or Schroedter acted from any motive or for any reason other than the one they gave at the hearing. Perhaps Michaels is correct in believing that Plachy wants to get rid of him, but I cannot find that Plachy's motivation is based on any protected activity engaged in by Michaels. In any event, Plachy did not make the decision to discharge Michaels. That was the decision of Dennis Schroedter, reviewed by Roger Johnson, and upheld by an apparently unbiased employee-management appeal panel in the grievance process.

Respondent's records do not show disparate treatment. At least five other nonprobationary employees were discharged

for excessive absenteeism during the period 1989–1990. On brief, General Counsel attempts to find differences between these discharges and that of Michael. Such difference do exist and differences exist as well between the circumstances of each of these discharges. Johnson credibly testified that each case is considered individually and not by a rigid standard. General Counsel does seem to overlook the fact that Michaels had been repeatedly warned over a period of years about his absenteeism.

For the reasons set forth above, I do not find that General Counsel has made a prima facie case that Michaels' discharge was motivated in whole or in part by his protected activity, and on the contrary, find that it was motivated by the reasons advanced by the Respondent.

C. Did Respondent Threaten Employees with Discharge and Withhold an Employee's Raise Because of Their Protected Activity?

For the reasons set forth in my fact findings, I do not credit the testimony of Sullivan on which the complaint allegations of threats of discharge are based. Therefore, I recommend these allegations be dismissed.

With respect to the matter of the denial of the wage increase to Saldanha, the matter is more complicated. I agree with General Counsel that it stretches the bounds of coincidence that the most visible union supporter was chosen to be the first employee reevaluated under the new evaluation system. Saldanha believed his union activities played a part in the evaluation and I agree, based on the circumstances and the comment of Carney that he believed the evaluation was because of the Union. Even if Respondent's asserted reasons for the evaluation are true, by leading Saldanha to believe the evaluation was based on his union activity, it was clearly coercing the employee and tending to restrain him from further such activity. On the other hand, union animus, if it did exist, must have gone no further than Schmitt. Magnifico, with the blessing of Vice President Johnson, immediately remedied the situation as soon as she learned of it, because she saw the fundamental unfairness of the treatment of Saldanha. If upper management were intent on harming Saldanha by denying him a raise, certainly Magnifico's efforts would have been thwarted. There was no hesitation on the part of human resources in allowing her to correct the evaluation. Moreover, for reasons not detailed in the record, Cole and Schmitt were relieved of the responsibility of managing the maintenance employees almost immediately after the Saldanha evaluation.

I find that by giving Saldanha an evaluation recommending no wage increase and leading him to believe that the poor evaluation was based on his activity in support of the Union, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1). As Respondent on its own part has remedied the monetary effects of the unlawful act, I will only recommend that an appropriate remedial notice be posted.

CONCLUSIONS OF LAW

1. Respondent Alexian Brothers Medical Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 399, International Union of Operating Engineers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding a raise from Joachim Saldanha either because of his protected activities, or leading him to believe that such activities were the cause of the raise being withheld, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices found to have been committed are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not engaged in the other unfair labor practices alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, it is recommended that it be ordered to cease and desist therefrom, and post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Alexian Brothers Medical Center, Elk Grove, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding raises from its employees because they engaged in protected activity in support of the Union, or leading its employees to believe that such raises were withheld for engaging in such protected activity.

(b) In any like or related manner interfering with, coercing or restraining its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Elk Grove, Illinois, copies of the attached notice marked "Appendix."¹⁷ Copies of this notice, on forms supplied by the Regional Director for Region 13, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."